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In The

Supreme Court of the United States

OCTOBER TERM, 1971

~~No. 6158~~ 70-5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated,

Appellants,

-v-

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON SITTING AS A THREE-JUDGE COURT

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF COMMUNITY ACTION FOR LEGAL SERVICES, INC. AND MFY LEGAL SERVICES, INC.

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MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF COMMUNITY ACTION FOR LEGAL SERVICES, INC. AND NFY LEGAL SERVICES, INC.

Motion for Leave to File a Brief Amici Curiae

Community Action for Legal Services, Inc., and MFY Legal Services, Inc., having sought and failed to obtain the consent of Appellee Dorothea M. Normet to the filing of a brief amici curiae in this court in the case of Lindsey v. Normet et al., No. 6158, October Term 1971, respectfully request that leave be granted for them to file the annexed brief amici curiae in the above mentioned proceeding for the reason that both organizations have a great interest in the decision to be rendered by this Court in Lindsey v. Normet et al., supra, in that they provide free legal services to the poor in the City of New York and represent poor tenants in summary eviction proceedings who necessarily will be affected by the decision to be handed down by this Court.

Community Action for Legal Services, Inc. and MFY Legal Services, Inc. believe that the impact of Lindsey v. Normet et al., upon summary eviction proceedings in New York City will not be presented by the parties and is relevant to the disposition of this case.

WHEREFORE, it is respectfully requested that Community Action for Legal Services, Inc. and MFY Legal Services, Inc. be granted permission to file the annexed brief amici curiae.

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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON SITTING AS A THREE-JUDGE COURT

Interest of the Amici

Community Action for Legal Services, Inc. (CALS) is the central coordinating corporation for ten other corporations which provide free legal services for the poor in the twenty-six designated poverty areas of New York City. Permission for CALS to practice law pursuant to Section 495(5) of the Judiciary Law was granted by the Appellate Division, First Department, of the Supreme Court of the State of New York on October 10, 1967 and renewed on September 29, 1969.

As the entity charged with the primary responsibility for providing free legal services to the residents of the poor neighborhoods of New York City, CALS, along with its subsidiary corporations represents large numbers of poor tenants in summary eviction proceedings and is familiar with the hardships imposed upon the poor by summary eviction procedures.

MFY Legal Services, Inc. (MFY) is a corporation operating six neighborhood law offices which provide free legal services to the poor on the lower east side and upper west side of Manhattan. MFY, one of the pioneering anti-poverty organizations in New York City, has been providing free legal representation for the poor for approximately six years.

Both CALS and MFY, which operates under the umbrella of CALS supervision and control, have represented numerous tenants in summary eviction proceedings throughout New York City. Because New York City presently faces a housing crisis of enormous proportions which effects the poor more drastically than other elements of the

Interest of the Amici

population, CALS and MFY have an obvious and immediate interest in legal issues affecting the poor tenant.

Although the Oregon forcible entry and unlawful detainer statutes involved in the instant case differ from New York summary proceedings law, their similarity is great enough to raise the same questions with respect to their constitutionality. In Velazquez v. Thompson, Docket No. 35556, presently pending before the United States Court of Appeals for the Second Circuit, litigants represented by CALS have challenged the New York summary proceedings law on substantially the same constitutional grounds relied upon in the instant case. Any decision rendered by this Court in the case presently at bar will necessarily affect the determination in Velazquez v. Thompson, supra, and the status of summary eviction proceedings in New York.

In this brief amici will address themselves to the constitutionality of summary eviction statutes viewed in the context of New York law.

Argument

I.

NEW YORK'S REAL PROPERTY ACTIONS AND PROCEEDINGS LAW DENIES TENANTS ADEQUATE PROCEDURAL PROTECTION AND SAFEGUARDS.

New York's law relating to summary proceedings to recover possession of real property is

similar to Oregon's forcible entry and unlawful detainer statutes in that they both provide tenants inadequate notice of the eviction proceeding, inadequate time in which to prepare for trial, inadequate procedural safeguards at other crucial stages of the litigation and place unnecessarily stringent conditions on access to appellate courts.

In New York the law governing evictions is set forth in Article Seven of the Real Property Action and Proceedings Law (RPAPL). That law provides that a summary proceeding to recover possession of real property may be instituted when the tenant holds over after the expiration of his term or where the tenant has defaulted in the payment of rent after the landlord has made a formal demand for the rent due (RPAPL §711). The proceeding is commenced by the service of a Notice of Petition and Petition by personal service, by substituted service upon a person of suitable age and discretion residing or employed in the subject premises, or by conspicuous service by nailing the Notice of Petition and Petition to a conspicuous part of the premises sought to be recovered. If either of the latter two methods of service is employed the landlord must also mail a copy of the Notice of Petition and Petition to the tenant (RPAPL §735). No attempt need be made to personally serve before conspicuous or substituted service is employed except that in order to support a judgment for rent, due diligence must be made to otherwise serve before conspicuous service may be employed. Joseph E. Seagram & Sons v. Rossi, 45 Misc.2d 427, 257 N.Y.S. 2d 60 (Civ. Ct. N.Y. Co., 1965).

Argument

The tenant's answer to the petition may be made at the time the petition is noticed to be heard or prior to that in certain situations (RPAPL §743). The petition must be noticed to be heard not less than 5 or more than 12 days after service (RPAPL §733). In non-payment proceedings in the city of New York tenants must answer before the clerk within 5 days after service and if the tenant answers, trial must be set for not less than three or more than eight days after joinder of issue (RPAPL §732). However if the tenant fails to answer within five days from the date of service, the judge is directed to render judgment in favor of the landlord (RPAPL §732[3]).

Upon a final judgment for the landlord, after trial on the merits or default by the tenant, the court issues a warrant directing the City Marshal to remove the tenant and return full possession to the landlord. The officer to whom the warrant is directed must give 72 hours notice of the eviction to the tenant (RPAPL §749[2]). The issuance and execution of the warrant may be stayed for limited periods of time, four months outside New York City (RPAPL §753[1]), six months for holdover proceedings in New York City (RPAPL §753 [1]), five days for non-payment proceedings in New York City where there has been a trial or ten days from the date of service where there has been a default by the tenant (RPAPL §732[3] and [4]). In non-payment proceedings when the tenant defaults the landlord is not required to prove a prima facie case before a default judgment is entered in his favor.

Argument

The provisions of Article Seven of the RPAPL have a cumulative effect. Any one provision such as that relating to service of process is compounded by the other provisions providing a short time in which to answer and a short time in which to prepare for trial. Tenants may be evicted from their homes within ten days of alleged service of process without having been afforded a reasonable opportunity to have their defenses heard. This is an extreme hardship in the City of New York where the vacancy rate for apartments is less than one percent.

A. Section 735 of The New York Real Property Actions and Proceedings Law deprives tenants of adequate notice of and opportunity for a hearing prior to eviction.

As stated previously RPAPL §735 provides that service of process in summary proceedings to recover real property may be accomplished in three ways that is by personal, substituted or conspicuous service and there need be no attempt to serve personally or by substituted service before conspicuous service is employed. In fact the most common method of service of process in eviction cases is conspicuous service. For the past few years there has been public recognition of the fact that in New York City there is widespread failure to comply with the legal requirements of service coupled with the submission of perjurious affidavits of service. This practice

is commonly referred to as "sewer service."[1] In Central Budget Corp. v. Knox, 307 N.Y.S. 2d 936 (Civ. Ct. N.Y. Co., 1969) the court recognized that sewer service was a problem of great magnitude stating:

> It is common knowledge, and has been for at least a year, that some process servers engaged by attorneys to serve papers in connection with cases pending in this Court have habitually submitted perjurious affidavits of service.... This is more than a problem. It is a scandal...(307 N.Y.S. 2d at p. 938).

The uncertainty of conspicuous service coupled with the prevalence of "sewer service" combine to prevent RPAPL §735 from insuring adequate notice to tenants.

The problem is compounded because in a non-payment summary proceeding in the City of New York if the tenant defaults, the court automatically issues judgment for the landlord. On the basis of this judgment, the tenant will be removed from his home by the Marshal (RPAPL §742).

The Court's procedure in automatically issuing judgment is in accord with Section 732 of the

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1. See generally 3 Columbia Journal of Law and Social Problems, Abuse of Process: Sewer Service (1967); 23 Record Association of the Bar of the City of New York, 263 (1968); Default Judgments in the New York Civil Court; a Preliminary study by the Congress of Racial Equality, introduced as Exhibit "A" in Velazquez v. Thompson, Docket No. 35556, U.S. Ct. of Appeals, 2nd Cir.

RPAPL (as adopted for New York City, by Rule 21 of the Rules for the Civil Court of New York):

> If respondent fails to answer within five days from the date of service, as shown by affidavit or certificate of service of the notice of petition and petition, the judge shall render judgment in favor of the petitioner (RPAPL §732[3]). (Emphasis added.)

In the context of the notorious prevalence of "sewer service" in the City of New York and the singular importance of shelter, it is a violation of due process for the court to issue its judgment simply on the basis of the often fraudulent affidavit of a process server, and the petition of the landlord. Kluprott v. United States, 335 U.S. 609 (1949) mod. 336 U.S. 949 (1949); Covey v. Somers, 351 U.S. 141 (1956); Thompson v. Louisville, 362 U.S. 199 (1960); Armstrong v. Manzo, 380 U.S. 545 (1965).

B. New York's Real Property Actions and Proceedings Law denies tenants adequate time in which to answer and prepare for trial and denies them procedural safeguards at other crucial stages of the litigation.

That summary proceedings under the RPAPL deny to tenants procedural benefits and safeguards can readily be seen upon a cursory comparison of that law with pertinent provisions of the Civil Practice Law and Rules (CPLR) and the Civil Court Act (CCA) which are generally applicable to all other actions affecting real property such as ejectment, partition, settlements of claims to

real property and adverse possession as well as to most actions affecting personal property. A summary examination of the differing procedures provided at crucial stages of litigation will serve to demonstrate that there are important disparities and that these disparities consistently operate to the disadvantage of the tenant.

Manner of Service

Article 7 sets forth procedures for service of process, necessarily affecting the fundamental due process right to adequate notice, which are less stringent than those provided for in the CPLR. RPAPL §735 permits conspicuous service after a reasonable attempt at personal or substituted service has failed, whereas CPLR §308, which is also applicable under the CCA, requires that there be due diligence to serve personally or by substitution before conspicuous service may be employed. Moreover, where there has been conspicuous service the CPLR provides that proof of service must be filed with the clerk within 20 days and that service is complete ten days after such filing. However, under RPAPL §735 proof of conspicuous service must be filed within three days and service is complete upon filing. Thus, the tenant is deprived of time in which to obtain counsel, prepare his defense or take any other steps to protect his interests. In summary proceedings conspicuous service is in fact most commonly used even though due to the nature of the proceedings the tenant's place of residence is ordinarily known and there rarely would appear to be any justification for other than personal service.

Argument

Time of Answer

Answers under the RPAPL may be made at the time the petition is noticed to be heard or prior to that in certain situations (RPAPL §743). The petition must be noticed to be heard not less than five or more than twelve days after service (RPAPL §733).

In non-payment proceedings in the City of New York tenants are required to answer within five days after service (RPAPL §732). However, CPLR §3012(a) and (c) which generally govern the time in which to answer provide that answers must be made within 20 days after service where the service has been personal and within 30 days where conspicuous service has been used. Similarly, in recognition of the fact that mail deliveries take time and are a less certain method of service, CCA §402 provides for additional time in which to answer where there has been conspicuous service. That section provides that answer must be made within ten days where the service is personal and with thirty days where not personal. Thus, under Article 7 not only is the benefit of a longer more reasonable time in which to answer denied to tenants but by failing to provide additional time in which to answer where there has been conspicuous service, tenants are actually afforded less time in which to answer, by reason of the delay entailed by mailing, than they would have had if the service had been personal. In reality the requirement that a copy be nailed to the door of the premises is rarely met and furthermore it cannot be assumed that actual notice is given even when a copy is affixed to the door for the reason that it

is not subject to the control of the tenant and may be removed by anyone.

Time of Trial

Under RPAPL §732(2) trials must be set by the clerk not less than three or more than eight days after joinder of issue and under RPAPL §733(1) trial must be set for not less than five or more than twelve days after service. On the other hand under CPLR §3402 the trial is set for twenty days after service of an answer or forty days where there has been no answer and CCA §1301 provides for trial not less than five or more than fifteen days from joinder of issue. Thus under both the CPLR and the CCA, a greater amount of time is afforded before trial than is granted under Article 7.

Inquest

In summary proceedings the essential relief granted is a judgment awarding possession of the premises to the landlord. The judgment for money in the non-payment proceeding is merely incidental to the judgment for possession. Moreover unless service of the Notice of Petition and Petition is by personal service or due diligence is shown before substituted or conspicuous service is used, no judgment for money can be entered where the tenant defaults in answering. RPAPL §735, Wayside Homes, Inc. v. Upton, 40 Misc. 2d 1087, 244 N.Y.S. 2d 624 (Dist. Ct. Nassau Co. 1963); Joseph E. Seagram & Sons, Inc. v. Rossi, supra.

Argument

Rule 18(b) of the Civil Court Rules provides that where the judgment is for relief other than, or in addition to, a certain sum of money, legally acceptable proof of the claim must be submitted to the Court before a default judgment will be granted. And CPLR §3215 provides that unless the judgment is solely for a sum certain application for a default judgment must be made to the Court, and if the defendant ever appeared in the case, it must be on notice to him. All of these protections accrue to the ordinary defendant. However, a tenant against whom a judgment of possession for non-payment of rent is being sought, is denied such protection. RPAPL §732 (3) provides that if such a tenant defaults, the judge shall render judgment in favor of the petitioner, with no inquest, no requirement that legally acceptable proof be offered to the Court.

Stay of Execution of Warrant

Under Article 7 the length of time which the execution of a warrant may be stayed in non-payment proceedings in New York City is limited to 5 days where there has been a trial or 10 days where there is a default in answering. (RPAPL §732 [3]). Because in New York City the great bulk of eviction proceedings are based on non-payment of rent, large numbers of tenants must suffer the incalculable hardship of being evicted from their homes on extremely short notice. It must constantly be borne in mind that due to the acute housing shortage in New York City it is a practical impossibility for all

but the rich to secure replacement housing which they can afford in such a short period of time. Generally under CPLR §2201 a court may grant stays upon such terms as may be just without any specified time limitation. If this general standard were applied to eviction proceedings in New York City, stays of much greater duration than those provided for by statute would be granted given the housing shortage existing in New York City. Although longer stays are permissible in all eviction proceedings outside of New York City, [4 months (RPAPL §751 (4))] and in hold-over proceedings within New York City, [6 months (RPAPL §753 (1))] even these time limitations are often inadequate. New York City tenants subject to the 5 day-10 day stay in non-payment proceedings, and other tenants subject to the 4 month or 6 month stay are all caused to suffer hardships on account of the time limitations, hardships which are not suffered by parties to other actions involving real and personal property.

Execution of Warrant

A warrant of eviction may be obtained and the eviction accomplished within 72 hours after entry of the judgment (RPAPL §749[2]). However under RPAPL §221 other property actions resulting in judgments of possession may not be executed upon except after application to the court showing non-compliance with the judgment.

In order to comprehend the degree to which tenants are discriminated against, Article 7 must be read as a whole. The effect of any one provision

such as that regarding service of process is compounded by other provisions which serve to diminish the tenant's ability to defend against the proceeding such as the shortened time limit for completion of service, time in which to answer and time in which trial may be set. Under RPAPL Article 7, tenants are thus deprived of substantial procedural benefits and safeguards which the state affords to persons with other interests in real and personal property.

C. Stringent conditions unnecessarily limit the tenants' right to appeal.

An appeal from a judgment of eviction is meaningful for residential tenants only so long as the judgment is stayed until the appeal is decided because once vacated, an apartment will seldom, if ever, be regained. The conditions upon which a stay is granted are therefore of great importance to all tenants and especially to those who are poor.

Unfortunately, it is the uniform practice of New York appellate courts to grant stays of eviction pending appeal subject to such onerous conditions that they sharply limit the tenant's access to these courts. Under the common practice, a stay will be granted only if there is deposited with the court (or in some cases, with the landlord) not only the full amount of the judgment but also any other alleged arrears plus the subsequent rental payments as they fall due, see, e.g., Grand Manhattan Co. v. Rodriquez, New York Law

Journal, 2/18/71, p. 19, col. 2 (App. Term, 2nd Dept.). Tenants are thus deprived of their right to contest the validity of the claims for arrears and are also deprived of their statutory right to withhold future rent payments in order to obtain repairs. These are no small rights, as both are often vital to the question of whether the premises will be maintained in a habitable condition.

Residential buildings in poor neighborhoods are notoriously liable to be in dangerous disrepair (see generally, Report of the National Advisory Commission on Civil Disorders, Bantam ed., 1968, pp. 467-474). Among the most important remedies available to tenants seeking improvements in their housing conditions in New York are those statutes which permit the withholding of rent in substandard buildings, i.e., Article 7A, RPAPL, §755 RPAPL, §302(a), New York Multiple Dwelling Law. These laws provide various methods under which tenants may lawfully withhold rent until repairs are made or can, in certain cases, directly apply the rent monies to the needed repairs. Thus, if a tenant's eviction has been stayed by an appellate court on the condition that rent payments are kept current (or that disputed rents of past months are paid), he is forced to choose between prosecuting the appeal and availing himself of remedies which may be necessary to secure habitable housing. Since, in our experience, most litigation over rental payments involving the poor also involves questions of the safety and adequacy of the housing, the inequities imposed by the type of appellate stays ordinarily granted in New York are a very real burden on a large number of litigants

and therefore rise to the level of a constitutional deprivation.

Conclusion

WHEREFORE, it is respectfully requested that this court find that the Oregon forcible entry and unlawful detainer statutes deprive tenants of rights secured by the United States Constitution, reverse the judgment entered by the court below and enter judgment in favor of appellants.

Respectfully submitted,

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